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No. 03-733

Supreme Court, U.S.
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In The
Supreme Court of the United States

ENCINITAS COUNTRY DAY SCHOOL, ET AL.,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth District, Division I

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeal correctly denied a claim for compensation where it was determined that: (1) the landowner's taking claim was not ripe; (2) the landowner was not denied all economically viable use of its property; (3) the government's reasonable but erroneous assertion of continuing jurisdiction over the claimant's development project substantially advanced legitimate government interests; and (4) the interim delay that resulted from this assertion of jurisdiction was not motivated by bad faith?

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INTRODUCTION

The petition for certiorari in this case seeks relief from this Court because, petitioners contend, the intermediate appellate court in California improperly applied the "substantial advancement test" to a temporary taking claim. Petitioners assert that: 1) the lower court's decision is in conflict with those in other states and with this Court's precedents; 2) the lower court improperly required petitioners to demonstrate both complete economic loss and that the action failed to advance a legitimate state policy; and, 3) the lower court required petitioners to demonstrate "bad faith" in order to establish a temporary taking.

The petition lacks merit on numerous grounds. The most significant ground is that the dispute below is no longer viable. The lower court determined that petitioners failed to demonstrate that they had obtained a final, authoritative determination as to the uses to which their property could be put thereby making the taking claim unripe for adjudication. Because the petitioners failed to challenge the ripeness determination below and they do not challenge that determination in their petition for certiorari, their claim is not credible. Petitioners have acquiesced in the lower court's ripeness determination. This fatal defect is nowhere mentioned in the petition for certiorari.

The petition is riddled with other deficiencies. For example, relief is sought from a decision in the unpublished portion of an intermediate appellate court's opinion which cannot be cited as authority. Additionally, the lower court's determination is limited to unique facts which are unlikely to recur. Lastly, contrary to the contentions in the

petition, the lower court did not misapply taking law to them nor did it engraft new and improper standards to the requirements necessary for petitioners to demonstrate a temporary taking occurred. Consistent with the precedents of this court, the lower court rejected petitioners' inverse condemnation claim after finding that it was not ripe. Not stopping there, it also went on to conclude that petitioners were not deprived of all economically viable use of their property, and that the Commission did not act with the goal of delaying the petitioners' project. In light of these unchallenged findings, the petition is without merit and should be denied.

STATEMENT OF THE CASE

The California Coastal Act and the Coastal Commission

The California Legislature enacted the Coastal Act of 1976 (Cal. Pub. Res. Code, section 30000, *et seq.*) as a comprehensive scheme to govern land use planning for the entire coastal zone of California. *Yost v. Thomas,* 36 Cal.3d 561, 565-566, 685 P.2d 1152 (1984). The goals of the state for the coastal zone are to: "(a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and man-made resources." *Ibid.* Respondent California Coastal Commission ("Commission") is created pursuant to the Coastal Act from which it derives its authority. Cal. Pub. Res. Code, §§ 30300, *et seq.* (West 1996).

The Coastal Act states that "all local governments are required to prepare [a local coastal program ("LCP")] covering the territory within their boundaries in the

coastal zone." Cal. Pub. Res. Code, §§ 30109, 30500 (West 1996). The LCPs consist of a land use plan, zoning ordinances, zoning district maps and other matters which, taken together, meet the requirements of and implement the policies of the Act. *Id.* at § 30108.6. Once the Commission certifies the LCP for an area, the local government assumes permit issuing jurisdiction within its boundaries except for a few areas reserved for the Commission's special attention. *Id.*, §§ 30519, 30600, subds. (c) and (d), 30601.

In order to ensure that statewide policy objectives are met in designated geographical areas of the coast, even where the Coastal Commission has certified a local government's LCP, the Commission retains appellate jurisdiction over locally-issued coastal development permits for particular types of development. Cal. Pub. Res. Code, § 30603 (West 1996). For example, it retains jurisdiction to hear appeals on projects that fall between the first public road paralleling the sea and the sea or projects that are within 100 feet of a wetland. *Id.* at § 30603, subd. (a)(1), subd. (2). The grounds for an appeal to the Coastal Commission are limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in the Coastal Act. *Id.* at § 30603(b)(1).

When an appeal is filed, the Commission is required to set a hearing on the appeal within 49 days. Cal. Pub. Res. Code, § 30621, subd. (a) (West 1996). Unless the Commission finds that the appeal fails to raise a substantial issue regarding conformity of the development with the requirements of the local coastal program or the access policies of the Coastal Act, the Commission is statutorily required to conduct a de novo hearing on the proposed

development project. *Id.* at §§ 30621, 30625. At the conclusion of the hearing, the Coastal Commission "may approve, modify or deny such proposed development . . . ." *Id.* at 30625(a).

The ECDS Application for a Coastal Permit

In 1998 Encinitas Country Day School, Inc., Kathleen Porterfield and M&M Development Company (hereafter collectively "ECDS") applied to the City of Encinitas ("City") to construct a private school. Pet. Cert., App., A-4. Because the project was within the City's coastal area, ECDS sought and obtained a coastal development permit from the City. *Id.* at A-4, A-5. The City's permit authorized development of a 432-student school on a vacant 20-acre parcel near San Elijo Lagoon (a salt-water lagoon) and near delicate habitat surrounding the lagoon. *Id.* at A-4, A-6, A-7.

The San Elijo Lagoon Conservancy, among others, filed appeals. Thereafter, the Commission found a substantial issue existed because the project appeared to conflict with the City's local coastal program. Pet. Cert., App., A-6. After a de novo hearing on ECDS's application, the Commission denied the permit. *Id.* at A-6, A-7.

After the appeal was filed with the Commission, it asserted that it had jurisdiction to hear the appeal based upon the property's location between the first public road, Manchester Avenue, and the sea, San Elijo Lagoon. Pet. Cert., App., A-6 and A-17. ECDS contended that the Commission could not assert appeal jurisdiction because the only basis for jurisdiction was limited to the proposed development being within 100 feet of a wetland, which ECDS contended its project was not. *Ibid.* This dispute

was compounded by a disagreement over the status of an appeal jurisdiction map. The map had been produced by the Commission's staff some twenty years earlier but had never received Commission approval. *Id.* at A-10. The map depicts a different first public road, and it bears a legend stating the it did not depict the entire extent of the Commission's appeal jurisdiction. *Id.* at A-23 and A-24. The circumstances were further confused because the City had been using the unapproved map for many years in its dealings with the public over coastal development permits. *Ibid.*

The Trial Court Action

In June 1999, ECDS filed an amended petition for a writ of administrative mandamus challenging the Commission's determination joined with a complaint for injunctive and declaratory relief and an inverse condemnation claim pursuant to the California Constitution and Fifth Amendment to the United States Constitution. Pet. Cert., App., A-8. The trial court bifurcated the action and decided the writ petition first. *Ibid.* The trial court determined that the Commission had lost jurisdiction to hear the appeal by failing to make the "substantial issue" determination within 49 days after the appeal was filed and because the Commission relied upon an erroneous interpretation of its geographic appeal jurisdiction. *Id.* at A-9.

After determination of the writ of mandate, the court tried the inverse condemnation claim. Pet. Cert., App., A-9. ECDS contended that the delay arising from the Commission's failure to make the substantial issue determination within 49 days and the Commission's erroneous assertion

of its geographic appeal jurisdiction resulted in a compensable temporary taking. Pet. Cert., App., A-5 through A-20. The trial court ruled that the Commission's application of the 49-day rule and its assertions concerning its geographic appeal jurisdiction were not arbitrary or capricious and were not intended to delay the petitioner's project but rather were a legitimate, albeit, erroneous assertion of jurisdiction which did not arise to a taking. *Id.* at A-9 to A-11. The end result of the trial court's action is that the City's coastal development permit for ECDS's project was approved by operation of law.

Appellate Review of the Trial Court Decision

The Commission appealed the ruling on the writ of mandate, and ECDS appealed the ruling on its inverse condemnation claim. Pet. Cert., App., A-3. In the published portion of its decision, the state court of appeal affirmed the trial court's decision granting the writ of mandate finding that the Commission lost jurisdiction over the project because the Commission failed to rule on its own jurisdiction within 49 days as the statute required. *Ibid.* In the unpublished portion of its opinion, the appellate court affirmed the trial court's decision denying ECDS's inverse condemnation claim. *Ibid.* The court of appeal found that ECDS's taking claim was not ripe for adjudication because ECDS had not received a final, authoritative determination of the extent and nature of development that could be approved on its property. Pet. Cert., App., A-20. For example, the lower court took note that the Commission's findings supporting the denial of the permit did not prohibit all development but expressed the position that the scope of the proposed project was too extensive and environmentally harmful. *Id.* at A-22. The court found

that ECDS could have, but did not, propose a smaller school project or any alternate project. *Ibid.* The court of appeal also found that at any time ECDS could have proposed residential housing as an alternative use of the property which applicable zoning and the local coastal program already permitted. *Ibid.* Accordingly, the appellate court determined that ECDS's taking claim was not ripe. Nevertheless, the appellate court also considered alternate grounds for finding a taking but determined that there was no basis for compensation because ECDS had not been denied all economically viable use of the property and because the Commission's actions substantially advanced legitimate state interests. Finally, applying California law which provides that compensation may be required in limited circumstances where delays occur in the permit process, the court found that the Commission's assertion of appeal jurisdiction was not so arbitrary and capricious that the court could conclude that it was a pretext only to delay the project. *Id.*, at A-23, A-24. The lower court also determined that ECDS never challenged the Commission's findings supporting its denial of the permit. *Ibid.*

Subsequently, ECDS petitioned the California Supreme Court to review the unpublished portion of the opinion. Pet. Cert., App., B-1. The California Supreme Court denied ECDS's petition. *Ibid.* Thereafter, ECDS filed its petition for writ of certiorari with this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. ECDS'S TAKING CLAIM IS NOT RIPE FOR ADJUDICATION.

The beginning point of any regulatory takings analysis is the determination of ripeness of the issue for adjudication. In order for a taking claim to be ripe, the property owner must have obtained "a final authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *accord Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 339-340 (2002); *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 137 (1978); *Palazzolo v. Rhode Island,* 533 U.S. 606, 618-622 (2001). It is only by obtaining this final, authoritative determination as to the nature and extent of allowable development that a court can determine if the regulatory activity has resulted in a taking. *MacDonald, Sommer & Frates, supra*, 477 U.S. at 349. If ECDS did not obtain "a final authoritative determination of the type and intensity of development legally permitted on the subject property," as this Court's precedents require, then its taking claim is not ripe for judicial review.

Here, the court of appeal found that ECDS's taking claim was not ripe for two reasons:

1. ECDS always had an economically viable development alternative; and,
2. There was no final determination of the scope and intensity of development allowable on the property.

With regard to the first reason, the court of appeal found that ECDS could have proposed (but did not) a

smaller school facility to meet the Commission's environmental objections. Pet. Cert., App., A-22. Additionally, the lower court observed that the ECDS land was approved for residential use for which ECDS could have applied at any time and that ECDS had not demonstrated that residential use was not economical. *Id.*, at A-22, A-23.

As to the second reason, the court of appeal found that the Commission left open the question of what different development or modified school plan could be approved. Pet. Cert., App., A-22, A-23. The court of appeal observed that the Commission's concerns were with the intensity of the development and that the Commission never took a position that would have precluded all development on the property. *Id.* at A-22. This case fits well into the framework of *MacDonald, Somer & Frates*, *supra*, 477 U.S. at 353, n. 9, which noted that the final decision requirement has not been met when a developer submits a grandiose development proposal which is denied leaving open the possibility that lesser or alternative uses might be approved. Here, not only was there the possibility that a smaller school development would be approved, but the City's zoning already designated the site for residential development. In these circumstances, ECDS's taking claim simply is not ripe.

II. THE DECISION BELOW IS UNPUBLISHED, HAS NO PRECEDENTIAL EFFECT AND IS BASED ON FACTS UNLIKELY TO RECUR.

The court of appeal did not publish the portion of its opinion dealing with ECDS's takings claim because the court recognized that it was dealing with an interim delay claim that was not ripe and, faced with unique facts surrounding the dispute over the Commission's appellate

jurisdiction that gave rise to the interim delay, that its decision did not establish any precedent. Notwithstanding, ECDS seeks review of that part of the decision. Pet. Cert., pp. 4, 6-7.

The court of appeal considered and rejected petitioners' inverse condemnation claim in the third section of its decision. Pet. Cert., App., A-17 through A-24. Most of this discussion involved a brief review of takings jurisprudence (*id.* at A-17 through A-21), along with a short analysis of the economic evidence presented at the trial (*id.* at A-22 through A-23). There also is a one-page discussion of the specific boundary dispute in this case. *Id.* at A-24. There was scant analysis of the takings issue in the opinion because there was little dispute that ECDS has not obtained a final determination of what development would be permitted on the property or that ECDS could make an economic use of the property. In light of these circumstances, it is not surprising that, pursuant to California's Rules of Court, the court of appeal designated that the second through fourth sections of its opinion were not to be published. *Id.* at A-1, A-3 through A-4.

In California, unpublished opinions have no precedential value and may not be cited or relied on by a court or a party in any other action or proceeding (with certain exceptions which are not applicable here). Cal. Rules of Ct., rule 977(a), Opp. to Cert, App., A-3 and A-4. Therefore, nothing in the unpublished portion of the opinion below concerning inverse condemnation may be used in any future action involving different parties. *See People v. Russo*, 25 Cal.4th 1124, 1133, 25 P.3d 641, 647 (2001).

Similarly, federal courts give no credence to unpublished state court decisions. For example, in *Civic Associates, Inc. v.*

Security Insurance Company of Hartford, 749 F.Supp. 1076, 1080-1081 (D. Kan. 1990), the plaintiff attempted to rely upon an unpublished California case, which the District Court rejected, noting that the case lacked precedential value in California and therefore "possesses even less sway in this court."

In ordering that the portion of the decision addressing ECDS's inverse condemnation claim not be published, the court of appeal was acknowledging that a case involving an unripe takings claim, based on a unique dispute over the Commission's appellate jurisdiction, does not meet the standards for publication. This decision does not purport to establish a new rule of law or to address issues of recurring public interest. ECDS's petition for certiorari does not raise legitimate claims about the effect of this decision but instead essentially asks this Court to issue an advisory opinion to address hypothetical disputes. Therefore, this portion of the decision cannot act as precedent, does not create a conflict with other published decisions, and does not merit this Court's review.

III. ECDS'S TAKING THEORY IS WITHOUT MERIT.

A. ECDS Misperceives the Basis of the Court of Appeal's Decision.

In its petition, ECDS casts its claims in a variety of ways. However, the essence of the claim is that the Commission's actions failed to advance a legitimate state interest. Keying off this assertion, ECDS then argues that the court of appeal erred because: 1) It required the petitioner to demonstrate both that the regulation did not substantially advance a legitimate state interest *and* that the petitioner was deprived of all economically viable use

of its land (Pet. Cert., pp. 7-16); 2) It concluded that an unlawful action may substantially address a legitimate state interest (Pet. Cert., p. 20); and 3) It required a showing of "bad faith" before it could determine whether the Commission's conduct failed to advance a legitimate state interest (*ibid.*).

The most fundamental flaw with the ECDS argument is that it completely mischaracterizes the court of appeal's decision. First, and most importantly, ECDS fails even to address the court of appeal's determination that its takings claim was not ripe. Indeed, ECDS is seeking to push takings jurisprudence into a wholly new realm – that is, even absent a final authoritative regulatory decision on permissible uses of the property, a plaintiff may maintain an action for inverse condemnation. ECDS cites to no case which supports such an extreme position, and indeed, as discussed *ante*, the teachings of this Court provide no support for ECDS's position.

Second, the court of appeal never found that the Commission's actions failed to advance a legitimate state interest or that, in asserting jurisdiction based upon the first public road standard, the Commission's actions were unlawful. Thus, the main premise of ECDS's arguments is completely absent from the court of appeal's decision. In fact, that court found as follows:

> Neither can we say that the reasons stated by the Commission for denying the coastal development permit, based on the intensity of the development and its impact on the environment and Manchester Avenue do not reflect legitimate state interests. Nor does ECDS challenge the reasons for denying the permit as being arbitrary or capricious.

Pet. Cert., App., A-24. With regard to the propriety of the Commission's use of the first public road as a basis for its appeals jurisdiction, the court of appeal expressly declined to resolve the issue. *Id.* at A-16. Therefore, ECDS simply cannot show that the Commission failed to advance a legitimate state interest or that the court of appeal found the Commission's assertion of appeals jurisdiction to be unlawful.

Moreover, the court of appeal did not require ECDS to show both a denial of all use and a failure to substantially advance a legitimate state interest in order to establish a taking. Instead, the court of appeal found that ECDS had not been deprived of all economically viable use of the property and that the Commission's unchallenged reasons for denying the permit did advance legitimate state interests. Nowhere in its petition does ECDS challenge these findings. In light of the court of appeal's determination that ECDS was not deprived of all economically viable use of its property, that the Commission was advancing a legitimate state interest and that the ECDS claim was not ripe, it is hardly surprising that the court of appeal concluded that ECDS was not entitled to compensation.

Similarly, the court of appeal nowhere engrafted a "bad faith" requirement on the question of whether a regulatory action substantially advanced a legitimate state interest. Instead, relying on the approach which the California Supreme Court adopted to address interim delays during the permit process in *Landgate v. California Coastal Com'n*, 17 Cal.4th 1006, 1024, 953 P.3d 1188, *cert. den.*, 525 U.S. 876 (1998), the court of appeal concluded that the Commission's assumption of jurisdiction on the basis of the first public road was not "wholly arbitrary or capricious or so unreasonable as to lead to an inference it

was done for the purposes of delay rather than representing a normal delay in the development process." Pet. Cert., App., A-23. Therefore, under *Landgate*, the Commission's actions were not a pretext to delay the project. As the court of appeal found:

> [T]he record contains substantial evidence indicating that it was a debatable issue whether San Elijo Lagoon was the 'sea' within the meaning of the Commission's regulations. The record is also clear that if the portion of San Elijo Lagoon near the ECDS property is an arm of the sea, then the first public road is Manchester Avenue and ECDS's property is located between Manchester Avenue and the San Elijo Lagoon. In other words, based on the record on appeal, we cannot say that accepting Manchester Avenue as the first public road from the sea was a completely untenable legal position.

Pet. Cert., App., A-24. And ECDS does not challenge these findings.

B. The Court of Appeal's Takings Analysis Comports With the Decisions of This Court

In addressing ECDS's inverse condemnation claim, it is critical to recall what the court of appeal actually did. That court considered a number of issues. First, it considered whether the ECDS claim was ripe and concluded that it was not because there was no final regulatory determination on the permissible uses of the ECDS property. In light of this unchallenged determination, the court of appeal could have concluded its analysis at that point. *MacDonald, Sommer & Frates, supra.* Instead, the court of appeal examined three other issues: whether ECDS had

been denied all economically viable use of the property, whether the Commission's action advanced a legitimate state interest, and whether the Commission's action was designed solely to delay the project. As to the first, the court of appeal concluded that ECDS had not been denied all economically viable use of the property because at all times, it either could have sold the property or it could have pursued the residential development for which the property was already zoned. Similarly, the court of appeal examined the basis for the Commission's denial of the ECDS permit to determine whether it advanced a legitimate state interest. The court of appeal concluded that the Commission's unchallenged reasons for denying the permit did advance a legitimate state interest. Thus, rather than creating a standard which required ECDS to meet both prongs of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the lower court actually found that ECDS had failed to meet either prong.

Finally, the court of appeal looked to whether the Commission's assertion of jurisdiction over the ECDS project was so arbitrary and capricious that it gave rise to the inference that the Commission was seeking only to delay the project. In *Landgate, supra*, the California Supreme Court dealt with those situations where delays in the permit process are not compensable through a takings claim. That court held that government decisions that occur during the course of the permit process do not constitute takings, even if those decisions are erroneous and lead to delay, because those decisions are a normal part of the permit process and must be resolved before government can make a final and authoritative decision concerning the use of property. This is consistent with *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional*

Planning Agency, *supra*, 535 U.S. 302, where this Court refused to hold that normal delays in the planning process (such as building moratoria) could give rise to takings claims. *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987) (recognizing that "quite different questions . . . arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" than those presented by an outright development ban.) Nevertheless, the California Supreme Court identified one exception to the rule that delay caused by a government mistake during the permit process is not compensable. It indicated that an erroneous government action during the permit process might constitute a taking if it were not a good faith mistake, but a pretext or "fabricat[ion]" for denying all development. *Landgate*, *supra*, 17 Cal.4th at pp. 1022, 1029. In effect, where the delay is in bad faith and merely serves as a pretext for denying *all* development, the matter is ripe for review.

Only in the context of determining whether the interim delay in this case could be compensable under a *Landgate* theory did the court of appeal examine the Commission's actions to determine whether they were a pretext interposed only to delay the project. It was only in this context that the court of appeal addressed whether the Commission's assertion of jurisdiction and denial of the permit were arbitrary and capricious or failed to advance a legitimate state interest. And the court of appeal concluded that it could not find that the Commission's actions were a pretext for delay or for denying all development. On this basis, the court of appeal properly rejected ECDS's inverse condemnation claim.

CONCLUSION

Based upon the foregoing, no grounds exist to support the granting of the petition for certiorari. The Commission respectfully requests that this Court deny that request.

DATED: January 21, 2004

Respectfully submitted,

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APPENDIX A

Division III

RULES FOR PUBLICATION OF APPELLATE OPINIONS

Rule

976. Publication of appellate opinions.
976.1 Partial publication.
977. Citation of opinions.
978. Requesting publication of unpublished opinions.
979. Requesting depublication of published opinions.

Adopted, eff. Jan. 1, 1964.

RULE 976. PUBLICATION OF APPELLATE OPINIONS

(a) [**Supreme Court**] All opinions of the Supreme Court shall be published in the Official Reports.

(b) [**Standards for publication of opinions of other courts**] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history

of a provision of a constitution, statute, or other written law.

(c) [**Publication procedure**]

(1) [*Courts of Appeal and appellate departments*] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) [*Supreme Court*] An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

(d) [**Superseded opinions**] Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or n part.

(e) [**Editing**] written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court and two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for publication as directed by the Supreme Court. Proof sheets of each opinion in the type to

be used in printing the reports shall be submitted by the Reporter of decisions to the court which prepared the opinion for examination, correction and final approval.

(As amended, eff. Nov. 11, 1966; Jan. 1, 1972; Jan. 1, 1983; May 6, 1985.)

RULE 976.1 PARTIAL PUBLICATION

(a) **[Partial publication authorized]** A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publication specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

(b) **[Other rules applicable]** For purposes of rules 976, 977, and 978, the published part of the opinion shall be treated as a published opinion, and the unpublished part as an unpublished opinion.

(c) **[Copy to Reporter of Decisions]** One extra copy of both the published and unpublished parts of the opinion shall be furnished by the clerk to the Reporter of Decisions.

(Adopted, eff. Jan. 1, 1983. As amended, eff. Jan. 1, 1984.)

RULE 977. CITATION OF OPINIONS

(a) **[Unpublished opinions]** An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any

other action or proceeding except as provided in subdivision (b).

(**b**) [**Exceptions**] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(**c**) [**Citation procedure**] A copy of any opinion citable under subdivision (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation.

(**d**) [**Opinions ordered published by Supreme Court**] An opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable.[1]

(Adopted eff. Jan. 1, 1974. As amended, eff. Jan. 1, 1983; May 6, 1985; Jan. 1, 1997.)

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[1] Any citation to the Court of Appeal opinion shall include reference to the grant of review and any subsequent action by the Supreme Court. [Footnote contained in supplied copy]